BRATTAIN CONTRACTORS, INC.

IBLA 78-55 Decided October 18, 1978

Appeal from decision of the Arizona State Office, Bureau of Land Management (BLM), conditionally rejecting Mineral Patent Application A-9242.

Affirmed in part, reversed in part, and remanded.

1. Evidence: Presumptions--Mining Claims: Determination of Validity--Mining Claims: Patent

   Although in certain circumstances a rebutable presumption of a mining claim's validity may be indulged, the presumption does not arise to support an application for patent of the fee title. The patent applicant is the movant party, and as such it is his obligation to make a satisfactory showing of his entitlement under the law and regulations.

2. Mining Claims: Location--Mining Claims: Placer Claims

   No location of a placer mining claim may include more than 20 acres for each individual claimant. Where claims in excess of 20 acres are located by an association of locators and there is no evidence of a qualifying discovery of minerals prior to the claim's conveyance to a single individual, the claim is void, and any subsequent discovery will serve only to validate a claim of 20 acres.

3. Administrative Procedure: Adjudication--Applications and Entries: Generally--Mining Claims: Contests--Mining Claims: Determination of Validity

   Where a mineral patent application is supported by information sufficient to

permit a mineral examination of the claims, but not sufficient for the adjudicator to approve the application for patent, he may properly call on the applicant for supplemental evidence to support the application. However, if the claimant fails to submit it, the adjudicator may not penalize such failure by summary rejection of the application for reasons relating to disputed issues of fact without notice and an opportunity for hearing.

4. Mining Claims: Location--Mining Claims: Relocation

Where a mining claimant alters the legal description in the location notice for his "Claim A," so that it now describes land previously embraced by a portion of his "Claim B," which was void ab initio as a matter of law, the alteration of "Claim A" must be considered a relocation rather than an amendment.

5. Conveyances: Generally--Courts--Evidence: Generally--Mining Claims: Possessory Right

Where a corporate patent applicant can trace its ownership of the claim back through a series of conveyances to a mesne owner who had title to the claim quieted in her by the decree of a court of competent jurisdiction, there is no need to look behind the quiet title decree to an earlier break in the chain of title unless there is reason to believe that the interest which is unaccounted for was not disposed of by the litigation. However, a court decree which merely distributes the assets of a decedent's estate is not a "quiet title decree" in this context, and does not ordinarily foreclose the interests of third parties who hold the record title to mining claims.

6. Mining Claims: Common Improvement--Mining Claims: Patent Improvements

Where in a patent application for a group of claims, prorata credit for the value of

a common, off-site improvement is to be attributed to each claim, it must be shown that the improvement was subsequent to the location of each claim so credited, and that the improvement is essential to the practical development and actually facilitates the extraction of ore from each claim.

7. Mining Claims: Possessory Rights--Mining Claims: Special Acts

Before a claimant may successfully invoke 30 U.S.C. § 38 (1976) to cure deficiencies in the method of location of, or title to mining claims, it must first be established that each of the claims is supported by a discovery of a valuable deposit of mineral, and that claimant and/or predecessors have "held and worked" each of the claims for the requisite period. Where these showings are disputed, notice and opportunity for a hearing must be afforded.

8. Administrative Authority: Laches--Administrative Procedure: Generally--Mining Claims: Contests

Where unpatented mining claims were located some 50 years before the claimant filed application for patent, during which time they went unchallenged by the Government, the United States is not barred from contesting the validity of the claims by invocation of the equitable defense of laches.

APPEARANCES: Tom Galbraith, Esq., Phoenix, Arizona, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On September 25, 1975, Brattain Contractors, Inc., filed its patent application for 20 placer mining claims. By subsequent amendment, including redescription of certain claims, the number of claims was reduced to 18. Of these, 14 claims were originally located by associations of locators and comprise from 40 acres to 160 acres each, and 4 of the claims are single locations of 20 acres each. The claims, located for gold, cover the bed and the land on both sides of the Hassayampa River in sec. 11, 14, 15, 22, and 27, T. 12 N., R. 3 W., Gila and Salt River meridian, Yavapai County, Arizona, and embrace some 1,640 acres. These claims are collectively referred to as "the Hobbs placers."

Between 1929 and 1931 one Joe W. Hobbs and his associates located six of the 160-acre association placer claims. Additional claims were located by Hobbs and associates between 1934 and 1936, and still others between 1940 and 1942. Over the years, at various times, Hobbs acquired the interests of his several co-locators, although it is said that there were certain imperfections in the chain of title. Upon Hobbs' death, his widow, Ida Hobbs, inherited the claims, and on July 6, 1960, title to the claims was quieted in her by order of the Yavapai County Superior Court. In 1961 Ida Hobbs conveyed the claims to her daughters, Helen Hobbs Bishop and Maryjane McConnell, who conveyed them to Edwin E. and Belva J. Brattain in 1971. In 1973 the Brattains conveyed the claims to Brattain Contractors, Inc., the patent applicant.

By letter dated May 26, 1976, the Arizona State Office of the Bureau of Land Management (BLM) advised Brattain Contractors of numerous deficiencies and inconsistencies which required clarification and/or correction, and also advised that additional supporting documents needed to be submitted. In response, on November 1, 1976, the applicant submitted various documents, including an amended patent application dated October 14, 1976. The corrected application revised the legal descriptions of certain claims, and eliminated two claims from the application.

By letter dated January 7, 1977, the Arizona State Office requested that additional corrections, information, and documents be submitted in support of the application. Of these, the following requested data relate specifically to this appeal:

> 1. The date of discovery and the discovery point for each individual claim must be specifically given.
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> 2. The applicant must furnish proof that the value of the improvements is not less than $500 per mining claim. Such workings claimed as improvements must be described in detail and tied to a public survey corner. In addition we must know who made the improvements and when.
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> 3. It appears the so-called "amended" location of the Boomer No. 3 mining claims takes in ground not embraced in the original location and can only be considered as a relocation and not as an amended location. Proof of the value of assessment work and improvements of more than $500 subsequent to August 18, 1976, will have to be submitted for the Boomer No. 3, which was relocated on that date, to be considered in this application. Discovery information must also be submitted concerning this claim.

4. A complete chain of title must be furnished which shows the transfer of interests of all other locators in the association placers to Mr. Hobbs.

On July 12, 1977, in response to this request, Brattain submitted an abstract of title and a description of improvements.

Having studied this submission, BLM issued its decision of September 29, 1977, rejecting the patent application, subject to the submission by Brattain of certain additional proof within 30 days. A summary of the holdings of that decision follows:

(1) As to the 14 association placers claims, Brattain must show the dates of discovery and discovery points on each claim, so as to establish that the discovery was made at a time when the original association of locators, or an equivalent number, were still the owners of the claim. This is necessary because without the qualifying discovery, the claims were invalid, and a conveyance by any of the claimants of an invalid claim creates no rights in the grantee. Moreover, where the grantee of an invalid association placer is a single individual or corporation, a subsequent discovery will serve to validate only a claim of no more than 20 acres, that being the maximum which can be established by a single entity.

(2) As to the three "single" locations, the Beginner, Good Luck, and Rosita placer claims, there has been no evidence submitted to establish that a discovery of a valuable deposit of mineral has been made on any of them.

(3) The attempt by Brattain to "amend" the location of the Boomer No. 3 has resulted in the relocation of that claim to land which was formerly described as part of the Mary No. 3 claim, which part of the Mary No. 3 was never legally located because it was noncontiguous to other land in the same claim. Because the Boomer No. 3 has been changed to include ground not within the original location, it must be regarded as a new location rather than as an amendment of a previous location. Brattain must therefore submit evidence of discovery, and character, extent and value of improvments subsequent to August 18, 1976, the effective date of the relocation of the Boomer No. 3.

(4) The "amendment" of the Surprise claim by Brattain, also on August 18, 1976, eliminated the SE 1/4 NE 1/4 sec. 15, which was formerly located as the Boomer No. 2. The abstract of the title indicates that the Boomer No. 2 was located by I. A. Wilder and Orval Crowdy, but there is no record of its conveyance by them, despite Brattain's unsubstantiated assertion that they quitclaimed the Boomer No. 2 to J. W. Hobbs. Evidence is required to show how Brattain Contractors can assert ownership of this claim.

(5) There is an inadequate showing of $500 worth of labor and/or improvements for the benefit of each specific claim. Expenditures for road work must be shown to be associated with the actual mineral development. Improvements which have common benefit to all, or a number of claims should indicate the apportionment of value to each. Expenditures relating to a "house" are not allowable, unless it can be shown that the house is utilized in furtherance of the mineral development of the claims. An expenditure for the improvement or development of one of a group of claims may be partially apportioned to others in the group only when such expenditure actually or directly "promotes the practically contemporaneous development of all the claims concerned."

From this decision Brattain Contractors, Inc., has appealed.

There is an unfortunate blend of accuracy and fallacy both in the positions taken by BLM and those assumed by appellant, which will require a rather laborious sorting out.

[1, 2] With regard to the 14 association placers, appellant admits that it cannot show the sites and dates of discovery prior to the critical dates of transfer from the several associations of locators to Joe W. Hobbs. However, appellant asserts, there is no regulation that requires a patent applicant to prove this in support of a patent application. Appellant contends that there is a presumption of validity of all of these claims while they were held by its remote predecessor associations, citing United States v. Zweifel, 508 F.2d 1150, 1154 (9th Cir. 1975), and Vogel v. Warsing, 146 F. 949 (9th Cir. 1906). United States v. Zweifel, supra, does not hold that there is any presumption of validity, merely that if one locates, marks, and records his claim in accordance with Federal and State law, he gains the right of possession. Vogel v. Warsing, supra, does refer to a presumption of discovery in favor of a locator holding against a competing claimant for the same ground, where one of the parties sought an injunction against the other. 1/

1/ We would point out, however, that other courts have held that there is "no presumption of mineral discovery from the mere fact of locations." Ranchers Exploration and Development Co. v. Anaconda Co., 248 F. Supp. 708, 718 (D. Utah 1965). It has also been stated that "no presumptions are indulged in favor of a claimant, even in possession, against the United States." Houck v. Jose, 72 F. Supp. 6, 10 (S.D. Cal. 1947), aff'd, 171 F.2d 211 (9th Cir. 1948). Moreover, it has been specifically held that 30 U.S.C. § 38 (1970) creates no presumption of discovery. United States v. Haskins, 505 F.2d 246, 251 (9th Cir. 1974).

It may be accurate to state that, in certain circumstances, a presumption of discovery will be indulged. As most legal presumptions are, it would be subject to rebuttal. However, the presumption will not extend to a situation where, as here, a single applicant applies for fee title to association placers covering far more land than the individual could claim in his own right. Here the applicant for title is seeking a gratuity (or at least a very considerable subsidy) based upon its assertion that it is entitled to it as a matter of fact and law. See Ickes v. Underwood, 141 F.2d 546, 549 (D.C. Cir. 1944), cert. denied 323 U.S. 713 (1944). The applicant is the proponent of the rule, or order, and as such it is his obligation to establish such facts as will show compliance with the law, failing which his application may not be granted. See Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). It would be absurd to argue that all a mining claimant need do is file an application for patent, and that the BLM adjudicator must then presume the validity of the claim, notwithstanding any failure of proof, and grant the title without further inquiry or demand for evidence. The presumption not only does not extend that far, it does not even arise in such circumstances.

Although appellant does not want to recognize the basic deficiency in its application, it has not shown that it is entitled to hold claims in excess of 20 acres each. The law clearly provides that no placer location shall include more than 20 acres for each individual claimant and may not exceed 160 acres for an association of up to eight individual claimants. 30 U.S.C. §§ 35, 36 (1976); 43 CFR 3842.1-2. Within the meaning of 30 U.S.C. § 35, it has been determined that a corporation is an "individual claimant," and therefore may not locate placer claims of more than 20 acres each. United States v. Toole, 224 F.Supp. 440 (D. Mont. 1963); United States v. Schnieder Minerals, Inc., 36 IBLA 194 (1978). It necessarily follows that if appellant wishes to claim ownership of claims in excess of 20 acres each, it must demonstrate that the various groups of associated locators made a qualifying discovery of a valuable deposit of mineral on each claim prior to the conveyance of the claim to a single individual, as the conveyance of an association placer claim which is not supported by a discovery is, in essence, the conveyance of a nullity. Further, the individual grantee of such an association placer claim who thereafter makes a discovery on that claim is entitled to claim and patent only the 20 acres on which the discovery is sited. United States ex rel. United States Borax Co. v. Ickes, 98 F.2d 271 (D.C. Cir. 1938), cert. denied, 305 U.S. 619 (1938); United States v. King, 34 IBLA 15 (1978); United States v. Harenberg, 9 IBLA 77, 86 (1973). Appellant's assertions that it is entitled to a presumption that all, or any, of these association placers were valid at the times they were conveyed to Joe W. Hobbs as a single individual, and that BLM may not require evidence of this, are wholly without merit.

[3] With reference to the Beginner, Good Luck, and Rosita (three of the "individual" 20-acre claims), the BLM decision declares that "evidence has not been submitted to establish a discovery." Appellant takes exception to this statement, pointing out that the auriferous river bed gravels are fully described in sections 2-5 of the "application book" and that "Map No. 4" thereof depicts the occurrence of these minerals on each of the claims. Appellant argues that the question of whether the evidence eventually adduced by the Government's mineral examiner supports the description contained in the application, and shows discoveries on each individual claim, is one which can only be resolved by further proceedings. At this stage, appellant says, it is premature for the adjudicator to decide the "ultimate issue" of discovery on the sole basis of the information contained in the application.

First, we must observe that if the BLM adjudicator is not satisfied with the evidence of discovery submitted with the patent application he has a right to so advise the applicant and request further evidence. He certainly is precluded from granting the application. Moreover, it would seem to be incumbent on the applicant to cooperate in providing such evidence in support of its own application so as to resolve any deficiencies and to facilitate the process.

However, appellant is correct in arguing that it is premature to reject the patent application on the adjudicator's finding of insufficient evidence of discovery. Before there can be any final disposition of a mineral patent application which is otherwise acceptable, there must be a mineral examination of the subject claims for the purpose, inter alia, of obtaining evidence tending either to confirm or refute the allegation that qualifying discoveries have been made. If the discoveries are confirmed by the BLM's minerals personnel, and if all else be regular, the application may be processed and a patent issued without quasi-judicial proceedings. If, however, the evidence yielded by the mineral examination impels a finding of "no discovery," or other impediment to issuance of patent, and the applicant does not voluntarily withdraw his application, BLM is left with no choice but to initiate contest proceedings to determine the validity of the claims. United States v. O'Leary, 63 I.D. 341 (1956). Prior to a final holding that the claims are null and void, BLM may not summarily reject the application on any finding of disputed fact. This is because the validity or invalidity of the claims is the ultimate issue in the contest proceeding, as well as the basis for rejection of the application. But if a charge of "no discovery" is finally proven in a proper proceeding, then not only must the patent application be rejected, the claims must be held to be null and void. United States v. Carlile, 67 I.D. 417 (1960). See United States v.

Heden, 19 IBLA 326, 343-344 (dissenting opinion) (1975); United States v. Taylor, 19 IBLA 9, 25-27 (1975), 82 I.D. 68, 74. 2/

[4] With respect to the remaining "individual" 20-acre claim, the Boomer No. 3, appellant alleges that the description in the original location notice was in error, and that this describes the boundaries of the claim as staked out on the ground. Therefore, says appellant, the change amounts to an amendment, and does not constitute a relocation. However, the ground which the change described was covered and described by a portion of another claim held by Brattain Contractors, i.e., the Mary No. 3 placer claim. That part of the Mary No. 3 was null and void as a matter of law, as it was not contiguous to the other lands in the claim. "[30 U.S.C. § 36] authorizes an association location of contiguous claims only and clearly implies that claims not contiguous may not be joined in a single location." Stenfjeld v. Espe, 171 F. 825 (9th Cir. 1909). A placer mining claim cannot be located over other prior claims so as to include within its boundaries unlocated and noncontiguous fractions lying between such prior claims. Stenfjeld v. Espe, supra. Admittedly, the circumstances of this case are somewhat different than those which prevailed in Stenfjeld, but many of the same points of law apply. It is clear that when the description of the Boomer No. 3 was altered so as to "float" that claim over to land previously embraced by the void portion of the Mary No. 3 claim, that action constituted a relocation of the Boomer No. 3.

[5] The BLM decision requires Brattain Contractors to show as to Boomer No. 2 claim that the locators, Wilder and Crowdy, conveyed the claim to J. W. Hobbs. However, appellant argues that this ignores the fact that upon the death of J. W. Hobbs, his widow, Ida Hobbs, asserted her claim to the Boomer No. 2 and the other claims

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2/ There may be situations in which the failure of mineral patent applicant to comply with a clear requirement of the regulations relating to the form of the application would result in the simple rejection of the application by the adjudicator. Such a situation might occur in an application for a patent of a lode mining claim, where the application was not accompanied by a mineral survey as required by 43 CFR 3861.1-1. The failure of an applicant to tender such a survey would necessitate the rejection of his patent application, but it would not necessarily imply that the mining claim was null and void. It is basically a distinction between the form of the patent application and its substance. The issue involved herein, i.e., the existence of a discovery at a specified date, is manifestly one of substance going to the validity of the claims or parts thereof, and is thus resolvable against the claimant only after affording the applicant notice and an opportunity for hearing on disputed issues of fact.

which are the subject of this application, and on July 6, 1960, title was quieted in her by the decree of the Yavapai Superior Court in Cause No. 7403. While it is not impermissible to look behind a quiet title decree in the course of a title examination, it is usually unnecessary, absent some reason to beleve that the litigation was ineffective to reach all potential interests and claims of third parties. The object and purpose of a "quiet title" suit is to determine the existing title, so that any and all rights of any litigant to the real estate may be determined in one suit. White v. Kenting, 134 S.W.2d 39 (Sup. Ct. Mo. 1939). However, our study of the court's decree in this case indicates that it was not rendered in a suit to quiet title in Ida Hobbs against all potential claimants, but, rather, it was a decree distributing the assets of the estate of the decedent, J. W. Hobbs, to his widow. As such, we cannot hold that this decree operated to foreclose the interests of third parties who hold record title to the property described therein. Accordingly, BLM did not err in requiring proof of conveyance of the Boomer No. 2 from Wilder and Crowdy to J. W. Hobbs.

[6] With reference to the requirement stated in the BLM decision that Brattain Contractors, Inc., support its application by further evidence that at least $500 worth of labor or improvements has been expended for the benefit of each claim, we are in substantial agreement with the Bureau's analysis of the law. The need for such expenditure is statutory. 30 U.S.C. § 39 (1976). 43 CFR 3861.2-3 indicates the nature of qualifying work or improvements in addition to the showing which must be made where an improvement is said to be of common benefit to a group of claims. Such common improvments, the regulation says, "must be excluded from the estimate unless it is clearly shown that they are associated with actual excavations, such as cuts, tunnel shafts, etc., are essential to the practical development of and actually facilitate the extraction of mineral from the claim." Moreover, the patent applicant must prove that all improvements were made by the applicant or his grantors, and this proof should consist of the statements of two or more disinterested witnesses. 43 CFR 3863.1-3. A road or building is not necessarily a mining improvement. 43 CFR 3861.2-3(a); White Cloud Copper Mining Co., 22 L.D. 252 (1896). However, even where such an improvement, common to a group of claims, is shown to be directly associated with actual excavations and essential to actually facilitiate the extraction of mineral, there still must be a demonstration that a portion of the value of such improvement can properly be attributed to each claim in the group for which benefit is alleged. This is not accomplished simply by taking the value of the improvement and dividing by the number of claims. It must first be established that each of the claims derives the direct benefit of the common improvement in that it is essential to facilitate the extraction of ore from that claim. Any claim located after the improvement was constructed cannot be

credited with any portion of the value of the improvement regardless of how beneficial it may be to that claim. Where the work or improvement is qualifying and the attendant benefits inure to a number of claims in a group, then each such claim may be credited with an equal, undivided, aliquot share of the value of the common improvement. Aldebaran Mining Co., 36 L.D. 551 (1908); James Carretto and Other Lode Claims, 35 L.D. 361 (1907).

Further, the BLM decision correctly held that an improvement common to a group of claims cannot be credited where there is a scheme of successive development of such claims unless there is an expenditure for the direct benefit of each, citing United States v. Wood Placer Mining Co., 32 L.D. 401, 402 (1904).

We conclude, therefore, that it was proper and appropriate for the BLM to ask for additional details which would indicate whether these several legal requirements had been met by the patent applicant. However, to the extent that issues of fact are raised by the applicant's showings, the patent application should not be rejected unless and until the findings of fact and conclusions of law adduced through a contest proceeding finally determine that rejection is required.

[7] Appellant also argues that any deficiencies in the method of location and title to the claims have been overcome by operation of 30 U.S.C. § 38 (1976). That statute provides that where the claimant and his grantors "have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State * * * where same may be situated," the claimant's right to a patent is established. Appellant asserts that in Arizona the requisite period is 5 years.

However, appellant's right to avail itself of the relief afforded by this section is severely in question. First, as appellant acknowledges, the statute does not dispense with the need to demonstrate a qualifying discovery on each claim. Cole v. Ralph, 252 U.S. 286 (1919). As noted earlier, the question of discovery on the several claims has yet to be resolved. Moreover, while appellant may have "held" the claims for the requisite term, it is doubtful whether it has "worked" the claims within the meaning and intent of the statute. Appellant has not engaged in mining the claims. Remonumenting claim corners, repair of buildings, sampling, mapping, etc., would seem to be activities more related to possession and exploration of the ground than to "working" it as a mine. We need not decide this aspect of the matter, however, since it, too, can be resolved only after a full exposition of the facts and law which a hearing can

[8] Finally, appellant seeks to invoke the equitable defense of laches to bar the United States from initiating a contest proceeding to determine the validity of the claims for which appellant is seeking the fee title.

This argument is wholly untenable. First, 43 CFR 1810.3 expressly provides:

> (a) The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of the officers or agents, or by their laches, neglect of duty, failure to act, or or delays in the performance of their duties.

Second, on the basis of studies conducted by this Department, it has been reliably estimated that there are more than 6,000,000 unpatented mining claims located on the public lands of the United States, excluding those in national forests. See Legislative History of The Federal Land Policy and Management Act of 1976, Pub. No. 95-99, p. 131. It would be an absurdity to say that as each of these claims was located over the past 106 years the Government was obliged promptly (1) to detect its existence, (2) conduct a mineral examination, and (3) initiate and conduct proceedings to determine its validity; or else thereafter forfeit all right to challenge the claimant's assertion that the claim is valid. To do so, as appellant implies the Government should have done, would have required a vast expenditure of manpower, resources, and expense, the vast bulk of which would have been totally wasted.

Third, appellant misconceives its own equitable position. Appellant says: "Here, the government chose not to bring a contest for nearly a half century, during which time evidence of the discoveries disappeared. It cannot now seek to profit from its own delays by imposing an impossible burden on the appellant." (Emphasis added.) Here appellant is the movant party. Appellant urges the validity of the claims on the basis of discoveries made. Appellant has applied to have conveyed to it the fee title to the land, alleging its compliance with all the prerequisite legal requirements. It was appellant's duty to preserve the evidence of the qualifying discoveries. If that evidence existed once, and has been lost through the passage of time, whose fault is that? It was appellant and its assignors who delayed in presenting a patent application to the United States "for nearly 50 years." In Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (9th Cir. 1963), the Supreme Court noted the risk attendant in not proceeding promptly to patent. Prior to the filing of the patent application the Government had no special obligation to adjudicate the claims' validity. If the appellant, a single corporate entity, purchased unpatented association placer claims without obtaining the necessary evidence that such claims were valid, appellant may not

shift the blame for this to the United States. Laches is an equitable defense, and even if it operated against the Government, which it does not, appellant is in no position to invoke it.

In Roberts v. Morton, 549 F.2d 158, 163 (10th Cir. 1977), sustaining United States v. Zweifel, 11 IBLA 53 (1973), 80 I.D. 323, the court said:

> We start with the general rule that ". . . the United States is not bound by state statues of limitation or subject to the defense of laches in enforcing its rights." United States v. Summerlin, 310 U.S. 414, 416, 60 S.Ct. 1019, 1020, 84 L.Ed. 1283; Board of Commissioners v. United States, 308 U.S. 343, 351, 60 S.Ct. 285, 84 L.Ed. 313. But even assuming some relaxation of these strict rules might be developing, there are no circumstances shown here to support the defense of laches. It is an affirmative defense requiring a showing of lack of diligence by plaintiff and prejudice to the defendant. Costello v. United States, 365 U.S. 265, 282, 81 S.Ct. 534, 5 L.Ed.2d 551; Bradley v. Laird, 449 F.2d 898, 902 (10th Cir.). We cannot say the Government was precluded from assertings its rights here. See United States v. California, 332 U.S. 19, 39-40, 67 S.Ct. 1658, 91 L.Ed. 1889.

Based upon all of the foregoing, we make the following holdings.

The rejection of the application for reasons relating to disputed questions of fact was premature and cannot be sustained. It is well settled that where there is a disputed question of fact on a controlling issue, the mining claimant is entitled to notice and an opportunity for a hearing. Moreover, the determination to initiate a contest proceeding should await the findings and recommendations of the mineral examiner(s) following the examination of the claims.

Except with respect to the original conveyance of the Boomer No. 2 claim, the requirement that the patent applicant provide further information was entirely justified, as the adjudicator could not act favorably on the application without the evidence called for in the decision. Additionally, the BLM should be supplied with all available information in order to facilitiate the mineral examination. But where, as here, a patent applicant has provided sufficient information to permit the mineral examination to go forward, the failure of the applicant to provide supplemental data cannot be penalized by summary rejection of the application.

A mineral examination must be conducted, the findings of which will serve as the basis for whatever further action is then deemed appropriate.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, reversed in part, and the case is remanded for further action consistent with this opinion.

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Edward W. Stuebing
Administrative Judge

I concur:

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James L. Burski
Administrative Judge

I concur in the result:

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Joseph W. Goss
Administrative Judge